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# HOFSTRA LAW REVIEW

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## ESSAY

### ENFORCEMENT OF WTO RULINGS: AN INTEREST GROUP ANALYSIS

*Mark L. Movsesian\**

Of all the many changes that the WTO has made in the international trading system, none has drawn more attention than the mechanism it has established for settling disputes between member states.<sup>1</sup> The WTO's Dispute Settlement Understanding ("DSU") provides that disputes are to be resolved in adversarial proceedings before impartial panels of experts.<sup>2</sup> These panels have authority to decide whether members' laws conform to WTO requirements; members may appeal

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\* Professor of Law, Hofstra University School of Law. I would like to thank Steve Charnovitz, the late Robert Hudec, and John McGinnis for thoughtful readings of earlier drafts; the participants in workshops at Notre Dame and the Institute of Advanced Legal Studies at the University of London for helpful comments; and Connie Lenz and Lisa Spar of the Deane Law Library at Hofstra for research assistance.

1. See, e.g., David Palmeter, *The WTO As a Legal System*, 24 FORDHAM INT'L L.J. 444, 468 (2000) (characterizing WTO dispute settlement system as "perhaps the most significant achievement of the Uruguay Round negotiations" that established the WTO); cf. William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 J. INT'L ECON. L. 79, 79 (2001) (noting that the dispute settlement mechanism "has attracted a great deal of attention" from WTO members and the general public alike). There is a voluminous literature on WTO dispute settlement. See Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons From the History of Supreme Court Review*, 20 MICH. J. INT'L L. 775, 777 n.8 (1999) (collecting sources).

2. WTO Secretariat, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, in THE WTO DISPUTE SETTLEMENT PROCEDURES, arts. 6-16, 19 (2d ed. 2001) [hereinafter DSU]. For a detailed description of the WTO's dispute settlement mechanism, see DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* (1999).

rulings to a permanent Appellate Body within the organization, which has the final say on questions of law and legal interpretation.<sup>3</sup> In a major departure from past practice, the new procedures include a strengthened enforcement mechanism.<sup>4</sup> Under the DSU, if a member fails to comply with a final ruling in a dispute, the prevailing party may retaliate by suspending trade concessions that it owes the offending member.<sup>5</sup> This retaliation can continue until the offending member implements the WTO's decision, for example, by changing its laws.<sup>6</sup>

Judging by the frequency with which members resort to it, the new mechanism is a stunning success.<sup>7</sup> In the eight years since the organization was established, members have filed nearly 300 disputes with the WTO.<sup>8</sup> Most of these have been resolved before reaching the enforcement stage, but the WTO has authorized retaliation in seven disputes,<sup>9</sup> three of them high-profile controversies between the United States and the European Communities.<sup>10</sup> Still, WTO dispute settlement has drawn great criticism, much of it focusing on the new enforcement mechanism.<sup>11</sup> Several commentators argue that the retaliation remedy is too weak and unpredictable to be of any real use,<sup>12</sup> particularly in

3. See DSU, *supra* note 2, arts. 17-19.

4. See, e.g., Robert A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 YALE J. INT'L L. 79, 84-86 (1998) (discussing legalistic reforms in the Uruguay Round); Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 488 (1994) (discussing strengthening of dispute settlement procedures in the Uruguay Round); cf. PALMETER & MAVROIDIS, *supra* note 2, at 153 (WTO dispute settlement "is, in all probability, the most effective area of adjudicative dispute settlement in . . . public international law"). For a description of past practice, see *id.* at 7-11.

5. See DSU, *supra* note 2, at art. 22.

6. See Lowenfeld, *supra* note 4, at 487.

7. See James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L & COMP. L.Q. 248, 250 (2001).

8. WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/14, ii (June 30, 2003), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) [hereinafter *Update*] (statistical overview showing 295 complaints notified to the WTO since January 1, 1995). This number is much greater than the number of disputes heard in the entire history of the old GATT system. See Cameron & Gray, *supra* note 7, at 250 n.15.

9. See *Update*, *supra* note 8, at ii.

10. See *Update*, *supra* note 8, at 128 (discussing *Hormones* dispute), 129 (discussing *Bananas* dispute), 141 (discussing *Foreign Sales Corporations* dispute).

11. See Mark Clough, *The WTO Dispute Settlement System—A Practitioner Perspective*, 24 FORDHAM INT'L L.J. 252, 253, 270 (2000).

12. See, e.g., Monika Büttler & Heinz Hauser, *The WTO Dispute Settlement System: A First Assessment from an Economic Perspective*, 16 J.L. ECON. & ORG. 503, 528 (2000); Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 712-13, 729 (2000); Philippe Ruttle, *WTO Dispute Settlement and Private Sector Interests: A Slow, But Gradual Improvement?*, in DUE

asymmetric disputes between large and small economies.<sup>13</sup> These critics advocate reforms that would make the enforcement mechanism more rigorous, such as authorizing collective retaliation against offending members,<sup>14</sup> or granting WTO rules direct effect in domestic courts.<sup>15</sup>

By contrast, other critics contend that the present enforcement regime is too coercive and inflexible.<sup>16</sup> To them, retaliation seems high handed, an attempt to force sovereign states to repeal laws that were enacted by democratically elected governments.<sup>17</sup> Suspending trade concessions, they point out, hurts innocent firms that find their products subject to higher tariffs.<sup>18</sup> Moreover, the retaliation remedy undercuts the WTO's own first principles by creating a situation where two

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PROCESS IN WTO DISPUTE SETTLEMENT 167, 173, 180-81 (Philippe Ruttley et al. eds., 2001) [hereinafter Ruttley, *WTO Dispute Settlement*].

13. On the relative ineffectiveness of the enforcement mechanism in asymmetric disputes, see PALMETER & MAVROIDIS, *supra* note 2, at 473-74; Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 338 (2000); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 408 (1995); see also Arvind Subramanian & Jayashree Watal, *Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?*, 3 J. INT'L ECON. L. 403, 403-04 (2000) (discussing developing countries' complaints); cf. John H. Jackson, *Emerging Problems of the WTO Constitution: Dispute Settlement and Decision Making in the Jurisprudence of the WTO*, in LIBERALISATION AND PROTECTIONISM IN THE WORLD TRADING SYSTEM 25, 31 (Philip Ruttley et al. eds., 1999) (arguing that small countries that lack in-house legal expertise are at a "substantial disadvantage against large entities like the United States or the European Community").

14. See Pauwelyn, *supra* note 13, at 336, 343-45.

15. For useful discussions of direct effect in the WTO system, see, for example, Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83, 116-22 (1998); Piet Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 COMMON MKT. L. REV. 11, 48-58 (1997); Ruttley, *WTO Dispute Settlement*, *supra* note 12, at 186-88; Philip Ruttley, *The Effect of WTO Agreements in EC Law*, in THE WTO AND INTERNATIONAL TRADE REGULATION 130, 131, 154-55 (Philip Ruttley et al. eds., 1998) [hereinafter Ruttley, *The Effect of WTO Agreements*]. For a piece advocating direct effect in regional trading arrangements, see Frederick M. Abbott, *Regional Integration Mechanisms in the Law of the United States: Starting Over*, 1 IND. J. GLOBAL LEGAL STUD. 155, 157-59 (1993). For a canonical discussion of direct effect in international law generally, see John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992).

16. See, e.g., Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 792, 832 (2001); Edward Alden, *Bad Losers Cast Gloom Over WTO's Disputes Procedure*, FIN. TIMES, Dec. 6, 2000, at 8 (discussing critics' view that enforcement mechanism has "often forced governments into unnecessarily belligerent actions").

17. See REPORT OF THE INTERNATIONAL FINANCIAL INSTITUTION ADVISORY COMMISSION 114 (2000) [hereinafter ADVISORY COMMISSION REPORT]; Movsesian, *supra* note 1, at 779 & nn.19-20 (discussing critics' views).

18. See Reinhard Quick, *TABD Still Supports Trade Dispute Settlement*, FIN. TIMES, Dec. 11, 2000, at 14; TRANSATLANTIC BUSINESS DIALOGUE, CINCINNATI RECOMMENDATIONS 37-38 (2000); see also Charnovitz, *supra* note 16, at 810-11 (arguing that WTO sanctions hurt "innocent economic actors" and violate the "basic human right" to "voluntary commercial intercourse").

countries—the offending member that has enacted the protectionist measure and the injured member that has responded with trade sanctions—have departed from free trade commitments.<sup>19</sup> These critics argue that the WTO should consider “softer” enforcement mechanisms with fewer “teeth.”<sup>20</sup>

In this essay, I defend the existing enforcement mechanism. I do so by explaining the mechanism in terms of interest group theory. Even though protectionist measures injure consumers as a whole, countries often adopt such measures to satisfy the demands of domestic interest groups that suffer because of free trade—for example, domestic firms that lose market share because of import competition.<sup>21</sup> By imposing burdens on the products of countries that adopt such measures, the retaliation remedy creates incentives for another set of domestic interest groups—exporters—to lobby against them.<sup>22</sup> Over time, if retaliation is correctly calibrated, the domestic groups that favor free trade can neutralize the effect of the domestic groups that oppose it.<sup>23</sup>

The retaliation remedy thus promotes compliance with WTO rulings without intruding directly on domestic institutions. In this way, the mechanism is superior to suggested reforms, like direct effect, that would commandeer courts or other national governmental bodies.<sup>24</sup> Indeed, the genius of the retaliation remedy lies in its ability to use the domestic political process to achieve the public interest. By setting one collection of interest groups against another, the retaliation remedy

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19. See Charnovitz, *supra* note 16, at 810; Quick, *supra* note 18, at 14. For more on this irony, see Lowenfeld, *supra* note 4, at 487.

20. Charnovitz, *supra* note 16, at 792, 832.

21. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 521-25 (2000); see also *infra* text accompanying notes 37-44.

22. See Judith Goldstein, *International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 133, 144-45 (Anne O. Krueger ed., 1998); Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES* 369, 389 (Friedl Weiss ed., 2000); Daniel R. Murray, *Foie Gras?: Making Economic Sense of the 1999 U.S. Tariffs on Gourmet European Goods*, 5 J. INT'L LEG. STUD. 243, 262-63, 264-68, 270 (1999); Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. (forthcoming 2004).

23. See Murray, *supra* note 22, at 267-68.

24. See ADVISORY COMMISSION REPORT, *supra* note 17, at 114 (arguing against direct effect for WTO); cf. Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems With Old Solutions*, 85 MINN. L. REV. 71, 77 (2000) (discussing the “legitimacy deficit” that international organizations “suffer . . . when attempting to acquire direct authority over the U.S. citizenry”).

encourages the adoption of free trade policies that benefit a nation's consumers as a whole.<sup>25</sup>

This essay proceeds as follows. First, I explain the interest group theory of trade restrictions, showing how interest groups can secure the adoption of protectionist measures that work to the detriment of consumers as a whole.<sup>26</sup> I then describe the WTO's enforcement mechanism and demonstrate how it can overcome the problems posed by protectionist groups and promote compliance with a nation's free trade commitments.<sup>27</sup> Next, I discuss the two disputes to date in which prevailing parties have resorted to the retaliation remedy, *Bananas* and *Hormones*.<sup>28</sup> Finally, I show how the retaliation remedy is superior to one suggested reform that has drawn a great deal of attention, namely, giving WTO rulings direct effect in national courts.<sup>29</sup>

One important qualification is necessary at the outset. This essay addresses trade restrictions that nations adopt to protect the economic interests of domestic groups. Of course, nations may adopt a variety of regulatory measures that have an incidental adverse impact on trade—environmental or public health measures, for example.<sup>30</sup> As long as they do not amount to pretexts for discrimination against foreign products, these sorts of measures are generally acceptable under WTO rules.<sup>31</sup> As a consequence, they should not implicate the DSU's enforcement mechanism, and I do not address them here.

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25. Cf. Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 67 (2000) (noting how bargaining among states with respect to trade concessions allows individual governments to pit exporters against protectionists, thereby increasing consumer welfare).

26. See *infra* text accompanying notes 37-44.

27. See *infra* text accompanying notes 45-87.

28. See *infra* text accompanying notes 88-110 (discussing *Bananas* and *Hormones*).

29. See *infra* text accompanying notes 111-141.

30. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 480-81 (4th ed. 2002).

31. See *id.*; McGinnis & Movsesian, *supra* note 21, at 550. For example, article XX of the General Agreement on Tariffs and Trade allows members to adopt various regulatory measures, such as measures "necessary to protect human, animal or plant life or health," as long as such measures are not "a disguised restriction on international trade." General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. Other WTO instruments contain similar language. See, e.g., Agreement on Technical Barriers to Trade, art. 2.2, Apr. 15, 1994, WTO Agreement, Annex 1A, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 1, 33 I.L.M. 117 (1994) [hereinafter TBT Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures, art. 2, Apr. 15, 1994, WTO Agreement, Annex 1A, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 1, 33 I.L.M. 1128 (1994) [hereinafter SPS Agreement]. Of course, it is often difficult to distinguish between bona fide regulation and covert protectionism. For an attempt to devise a procedure-oriented test, see McGinnis & Movsesian, *supra* note 21, at 572-89.

To understand how the retaliation remedy promotes compliance with WTO obligations, one must appreciate why nations adopt protectionist measures in the first place. The reason is not immediately apparent. As economists since Ricardo have recognized, protectionist measures retard nations' economic growth.<sup>32</sup> The theory of comparative advantage explains why this is so.<sup>33</sup> Nations have different endowments—natural resources, technology base, human capital, and other factors—that make it easier for them to produce some goods and services rather than others.<sup>34</sup> Nations prosper when they specialize in those goods and services they can produce comparatively efficiently—those goods and services with respect to which they have a comparative advantage—and import the rest.<sup>35</sup> Removing trade restrictions is thus a key to national economic success, as numerous examples since the Second World War demonstrate.<sup>36</sup>

Why, then, would a nation adopt a protectionist measure? The answer lies in interest group theory. While free trade benefits a national economy as a whole, certain groups within the economy suffer, namely, owners and workers in industries with respect to which the nation lacks a comparative advantage.<sup>37</sup> These groups lose out because of import competition, and they have strong incentives to lobby the government for measures that will protect them—high tariffs, import quotas, and the like.<sup>38</sup> Indeed, because their memberships are typically small and easy to organize, and because the stakes for them are so high, these groups are often very effective lobbyists, able to donate significantly large amounts of time and money to support their advocates in government.<sup>39</sup>

Of course, the majority of citizens stand to gain from free trade, and one might expect its wishes to prevail in a democratic society. But

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32. See DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 91-93 (1996) (discussing Ricardo and his contemporaries).

33. See JACKSON ET AL., *supra* note 30, at 7-14 (discussing theory of comparative advantage).

34. See *id.* at 12-13.

35. See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 662-63 (1996); see generally PETER H. LINDERT & THOMAS A. PUGEL, *INTERNATIONAL ECONOMICS* 27-56 (10th ed. 1996).

36. See McGinnis & Movsesian, *supra* note 21, at 521; see also Nichols, *supra* note 35, at 663-64. "Trade also accelerates diffusion of knowledge and technical innovation, thus accelerating the pace of the world's technological growth." *Id.* at 667.

37. See LINDERT & PUGEL, *supra* note 35, at 57-69.

38. See McGinnis & Movsesian, *supra* note 21, at 522-23.

39. See *id.* at 523; Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 37-39 (1991) (showing how "small groups with concentrated (high per capita) interests in lawmaking" can overcome collective action problems more readily than large groups).

citizens as a whole lack the motivations for political activity that spur protectionist interest groups.<sup>40</sup> While imports can create great cost savings for consumers in the aggregate, the effect on individual consumers is relatively small.<sup>41</sup> Consumers thus have relatively little incentive to monitor trade policy and reward politicians who support free trade.<sup>42</sup> Moreover, consumers are too large in number to be easily organized into a coherent pressure group.<sup>43</sup> As a result, protectionist groups are often able to secure trade restrictions even though they work to the detriment of society as a whole.<sup>44</sup>

The WTO's enforcement mechanism creates incentives for domestic groups to resist these protectionist pressures, thereby promoting a nation's compliance with its free trade obligations. The mechanism works as follows.<sup>45</sup> When a dispute settlement panel concludes that a member has adopted a measure inconsistent with WTO rules, it generally issues a report that explains its findings and "recommend[s]" that the member "bring the measure into conformity with" WTO requirements.<sup>46</sup> The member may appeal the panel's ruling to the Appellate Body, which has authority to "uphold, modify or reverse" the panel's decision.<sup>47</sup> A final report of either a panel or the

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40. See Goldstein, *supra* note 22, at 140.

41. See McGinnis & Movsesian, *supra* note 21, at 523-24; see also Goldstein, *supra* note 22, at 139. Of course, imports can create significant cost savings for some industries, namely, those industries that use the imports as inputs in the manufacturing process. See JACKSON ET AL., *supra* note 30, at 36. As a result, those industries may well have incentives to lobby against restrictions on those imports. I speak in the text of the mass of undifferentiated consumers. For a discussion of why import-sensitive industries often do not lobby as effectively as protectionist groups, see McGinnis & Movsesian, *supra* note 21, at 524 n.64.

42. Cf. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 379 (1999) ("[G]roups with a large number of members, such as consumers . . . each of whom is affected only slightly by legislation, will form effective political organizations only with great difficulty.").

43. See *id.*

44. Cf. Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 INT'L REV. L. & ECON. 27, 28 (1996) (explaining that a nation may adopt bad trade policies because "the domestic political process assigns disproportionate weight to the interests of domestic producers as compared to those of individual domestic consumers").

45. For a more detailed description of the enforcement mechanism, see generally PALMETER & MAVROIDIS, *supra* note 2, at 153-73.

46. DSU, *supra* note 2, at art. 19.1. The DSU provides that the panel and the Appellate Body "may suggest" specific "ways in which the Member concerned could implement the recommendations." *Id.* Reports generally do not include such "suggestions," however. As Hudec explains, WTO members and WTO bureaucrats alike prefer less precise recommendations, which allow more discretion for governments and whose ambiguity may disguise the WTO's inability to implement its rulings. Hudec, *supra* note 22, at 381-82.

47. DSU, *supra* note 2, at art. 17.13.



Appellate Body goes to the WTO membership—constituted, for these purposes, as the “Dispute Settlement Body” (“DSB”)—for adoption.<sup>48</sup> Adoption occurs according to a “reverse consensus” rule: adoption occurs automatically, unless the membership decides by consensus to reject the report.<sup>49</sup>

The DSU allows the offending member a “reasonable period of time” to comply with an adopted report.<sup>50</sup> If the parties themselves cannot agree on a time limit, the deadline is set by arbitration.<sup>51</sup> The DSU suggests a limit of 15 months from the date of a report’s adoption, but the arbitrator may set a shorter or longer period as circumstances warrant.<sup>52</sup> If the offending member fails to comply with the ruling within the time allowed, the complaining member is entitled to seek remedial relief.<sup>53</sup>

Remedies in the WTO are entirely prospective: they aim not to punish the offending member for past misdeeds, but rather to readjust trade relations so that the complaining member will not suffer loss in the future.<sup>54</sup> Two remedies are available. The first is “compensation,” defined, not as the payment of money, but as the dismantling of trade

48. See PALMETER & MAVROIDIS, *supra* note 2, at 16-17 (discussing composition of DSB); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 60 (2d ed. 1999) (same).

49. See DSU, *supra* note 2, at art. 16.4, art. 17.14; Green, *supra* note 4, at 84-85 (discussing “reverse consensus” rule). “Consensus” exists for these purposes “if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.” DSU, *supra* note 2, at art. 2.4 n.1. A panel report is to be adopted within 60 days of its circulation to the DSB; an Appellate Body report, within 30 days. See *id.* at art. 16.4, art. 17.14.

The reverse consensus rule is a marked change from the old GATT practice, under which a panel report was adopted only if there was a consensus in favor. JACKSON ET AL., *supra* note 30, at 263-64. For more on the old consensus requirement, and the criticisms that surrounded it, see Movsesian, *supra* note 1, at 784-85.

50. DSU, *supra* note 2, at art. 21.3. For an argument that the “reasonable period of time” can provide a grace period for non-compliance, see Gleason & Walther, *supra* note 12, at 720-21.

51. See DSU, *supra* note 2, at art. 21.3(c).

52. See *id.*; PALMETER & MAVROIDIS, *supra* note 2, at 157. Some early cases suggested that arbitrators would grant a 15-month period as a matter of course, but more recent decisions have specified shorter time limits. See Hudec, *supra* note 22, at 394; Gleason & Walther, *supra* note 12, at 715-18.

53. See DSU, *supra* note 2, at art. 22.1, art. 22.2; see PALMETER & MAVROIDIS, *supra* note 2, at 167. If the parties disagree about whether the offending member has implemented the report, there is another round of litigation, this time to assess the adequacy of compliance with the earlier ruling. See DSU, *supra* note 2, at art. 21.5; PALMETER & MAVROIDIS, *supra* note 2, at 165-66. If possible, the matter is heard by the same panel that heard the original dispute; the panel must issue a report on compliance within 90 days. See DSU, *supra* note 2, at art. 21.5. If the panel cannot complete a report within 90 days, it must inform the DSB of the reasons for the delay and the estimated date of completion. See *id.*

54. See PALMETER & MAVROIDIS, *supra* note 2, at 167; Hudec, *supra* note 22, at 382-86.

barriers by the offending member.<sup>55</sup> If the parties cannot reach agreement on “satisfactory” compensation within 20 days, the complaining member may request authorization for the second possible remedy: retaliation.<sup>56</sup>

Retaliation consists of the “suspension of concessions or other obligations” by the complaining member—that is, the erection of trade barriers against the products of the offending member.<sup>57</sup> Retaliation must be “equivalent” to the loss the offending member’s measure has caused the complaining member,<sup>58</sup> and should relate to the same economic sector: goods, services, and so on.<sup>59</sup> If the offending member objects to the proposed level of retaliation, or to the proposed sector, the matter goes to arbitration.<sup>60</sup> The DSB grants authorization to retaliate, on the basis of the arbitral report, according to the same reverse consensus rule that governs the adoption of panel and Appellate Body reports.<sup>61</sup>

55. See Pauwelyn, *supra* note 13, at 337; see also PALMETER & MAVROIDIS, *supra* note 2, at 167. The DSU provides that compensation “shall be consistent with” the requirements of WTO agreements. DSU, *supra* note 2, at art. 22.1. One of the most important of these is the non-discrimination requirement, and it is understood that the compensatory lifting of trade barriers must apply with respect to the products of all WTO members. See Pauwelyn, *supra* note 13, at 337 n.12; see also PALMETER & MAVROIDIS, *supra* note 2, at 167.

56. See DSU, *supra* note 2, at art. 22.2; see also Pauwelyn, *supra* note 13, at 337 & n.14 (characterizing suspension of concessions or other obligations as retaliation).

57. DSU, *supra* note 2, at art. 22.1; see Pauwelyn, *supra* note 13, at 337.

58. See DSU, *supra* note 2, at art. 22.4.

59. See *id.* at art. 22.3; PALMETER & MAVROIDIS, *supra* note 2, at 169-70.

60. See DSU, *supra* note 2, at art. 22.6, art. 22.7. If possible, the panel that heard the original case will conduct the arbitration; its report must issue within sixty days after the expiration of the “reasonable period of time” set for compliance. See *id.* at art. 22.6.

The sixty-day limit prescribed by article 22.6 creates a potential conflict with another DSU provision, article 21.5, which allows ninety days to adjudicate the sufficiency of compliance. What if the ninety-day period to adjudicate compliance has not run by the end of the “reasonable period of time?” Allowing arbitration to proceed under article 22.6 might result in the imposition of countermeasures before the question of compliance has been fully determined. See Hudec, *supra* note 22, at 395. The inconsistency between articles 22.6 and 21.5 has been managed on an ad hoc basis, but there are calls for a definitive resolution. See *id.* at 395-96. For more on this problem, see Gleason & Walther, *supra* note 12, at 721-26, 729-30.

61. See DSU, *supra* note 2, at art. 22.7; JACKSON ET AL., *supra* note 30, at 266-67; Green, *supra* note 4, at 85-86. For more on the reverse consensus rule, see *supra* note 49 and accompanying text.

The level of retaliation is set on a yearly basis, that is, *X* amount of retaliation per year. See, e.g., European Communities—Measures Concerning Meat and Meat Products (Hormones)—Original Complaint By the United States—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS26/ARB (July 12, 1999) ¶ 84 (awarding United States a maximum amount of roughly US\$ 117 million per year). Hudec observes that, with respect to the equivalency question, arbitration has been “almost perfunctory”: panels “have listened to all the information and to all the various theories of measurement . . . but in the end have rendered” decisions that fail to explain the “underlying calculations in detail.” Hudec, *supra* note 22, at 390.

One can readily see how this enforcement mechanism, and the retaliation remedy in particular, works to promote compliance with WTO obligations. As I have shown, nations adopt protectionist measures in order to satisfy the demands of interest groups that exert disproportionate influence in domestic politics.<sup>62</sup> The retaliation remedy alters the balance of power by creating incentives for another domestic group—exporters—to counteract the influence of protectionist groups and lobby for the removal of the offending measure.<sup>63</sup> The retaliation remedy thus encourages compliance indirectly, creating pressure for trade liberalization in the offending country without intruding overtly on domestic political actors.

Retaliation imposes costs on exporters in the offending country by denying them sales in the complaining country.<sup>64</sup> These costs create incentives for the exporters to put pressure on their government to remove the protectionist measure that led to the retaliation. Indeed, the complaining member can be expected to raise trade barriers in a way that targets precisely those exporters who are most likely to make their pain known to elected officials.<sup>65</sup>

The length of the enforcement process—an aspect that some critics have decried—may itself be useful in motivating exporters in the offending country.<sup>66</sup> As Hudec has observed, “the effects of retaliation are generated in several successive stages.”<sup>67</sup> Typically, the complaining country announces a long list of potential targets, which becomes progressively narrower as the process moves through arbitration.<sup>68</sup> Even

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62. See *supra* text accompanying notes 37-44.

63. See Goldstein, *supra* note 22, at 144-45; Hudec, *supra* note 22, at 388; see also Nzelibe, *supra* note 22, at 11.A.

64. See Murray, *supra* note 22, at 262-63, 270 (discussing effect of retaliatory tariff that United States imposed on European products in context of *Hormones* dispute).

The exporters may bear a second cost as well. Murray argues that the loss of access to the complaining country's market may well create a supply surplus in the exporters' other markets, including the exporters' own home market. See *id.* at 262-63, 270. According to Murray, this surplus will create downward pressure on the exporters' prices: quite simply, the exporters will be “stuck with . . . extra goods,” and will have to sell them for less. *Id.* at 263; see also Jas Kaminski, *Irish Exporters Manage So Far to Avoid Impact of US Trade Tariffs*, IRISH TIMES, July 31, 1999, at Bus. & Fin. 17 (explaining how Irish exporters fear this effect of American retaliatory tariffs). Of course, the retaliation may draw goods from third-country markets to the complaining country, thereby making room for the offending country's products and negating the effect Murray envisions.

65. See Murray, *supra* note 22, at 268.

66. For criticisms of the length of the enforcement process, see, for example, Clough, *supra* note 11, at 270-71, and Gleason & Walther, *supra* note 12, at 712, 731-35.

67. Hudec, *supra* note 22, at 388 n.34.

68. See *id.*; see also Charnovitz, *supra* note 16, at 814.

for those exporters who are eventually removed from the list, the threat of retaliation may provide enough incentive to lobby the government for removal of the offending measure.<sup>69</sup> better to pressure the government at an early stage than wait for the axe to fall. Indeed, the desire to create free-floating anxiety about retaliation seems to be the purpose behind the "carousel" provision of United States law, which generally requires USTR to revise the list of targets for retaliation every six months.<sup>70</sup>

To be sure, retaliation also imposes costs on the retaliating country itself.<sup>71</sup> By raising barriers to foreign competition, the retaliating country denies its consumers access to cheaper, higher-quality imports and interferes with the efficient distribution of resources that the theory of comparative advantage envisions.<sup>72</sup> But these criticisms miss an important point. Retaliation in a trade dispute is not so much an economic strategy as a political one.<sup>73</sup> The goal is not to make the complaining country "whole" in an economic sense, but rather to spur the target country to adopt free trade policies that ultimately will benefit the citizens of both countries.<sup>74</sup> In this way, retaliation can serve a beneficial purpose, even if it does impose short-term economic loss.<sup>75</sup>

Even if one accepts these claims in favor of the retaliation remedy, one might question whether a formal authorization adds anything. Retaliation would be available as a strategy without a third-party process:<sup>76</sup> even without the approval of a supranational organization, a nation could target a foreign country's exporters in the hope of

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69. See Hudec, *supra* note 22, at 388 n.34; see also Martin Crutsinger, *US Issues Tariff List in Battle With Europe*, HOUSTON CHRON., April 10, 1999, at 3 (discussing European complaint that "mere publication" of proposed targets has a "chilling effect" on firms' ability to sell in American markets).

70. Trade and Development Act of 2000, Pub. L. No. 106-200, § 407, 114 Stat. 293; see also Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839, 950-51 (2000) (discussing carousel provision); Helene Cooper, *Food Fight With Europe May Worsen*, WALL ST. J., Sept. 6, 2000, at A2; Robert O'Neill, *Making a List, Checking It Twice*, 32 NAT'L J. 2505 (2000).

71. See, e.g., Charnovitz, *supra* note 16, at 814-15; Palmetier, *supra* note 1, at 472; Young, *supra* note 13, at 408.

72. See Charnovitz, *supra* note 16, at 814-15.

73. See Hudec, *supra* note 22, at 388.

74. See *id.*

75. Adam Smith himself recognized this justification for retaliation in a trade dispute:

There may be good policy in retaliations of this kind, when there is a probability that they will procure the repeal of the high duties or prohibitions complained of. The recovery of a great foreign market will generally more than compensate the transitory inconveniency of paying dearer during a short time for some sorts of goods.

1 ADAM SMITH, *THE WEALTH OF NATIONS* 490 (Edwin Cannan ed., 1976).

76. See Green, *supra* note 4, at 108-10 (discussing this scenario).

pressuring that country to change its trade policy.<sup>77</sup> The DSU's mechanism for authorizing retaliation offers two important advantages over the self-help model, however. First, the requirements that retaliation be equivalent to the complaining member's loss, and that retaliation relate to the same economic sector as the original violation, serve as checks against excessive and indiscriminate reprisals.<sup>78</sup> Such checks are necessary: protectionist groups in the complaining nation would like nothing better than to raise barriers to foreign competition, and likely would view "remedial" retaliation as an opportunity to inflict costs far beyond the injury underlying the original dispute.<sup>79</sup>

Excessive retaliation would create serious problems. As I explained earlier, retaliation imposes costs on the complaining nation itself; the higher the level of retaliation, the greater those costs will be. More fundamentally, disproportionate retaliation might cause a popular backlash in the target country.<sup>80</sup> If citizens were to view the complaining country's retaliation as extravagant or unfair, they might grow resentful and decline to encourage their government to resolve the dispute.<sup>81</sup> Indeed, protectionist groups could turn popular resentment to their advantage by arguing for a "patriotic" resistance to the foreign demand for removal of the offending measure.<sup>82</sup>

To be sure, distinguishing between "excessive" and "equivalent" retaliation can be difficult in the context of a particular dispute. Like GATT panelists before them, WTO arbitrators have tended to announce conclusions about permissible levels of retaliation without providing detailed explanations.<sup>83</sup> But precise calculations are not all that important. What matters is that the WTO appear as a credible check on

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77. For example, since 1974, "section 301" has given the United States government the authority to retaliate against foreign unfair trade practices. *See* 19 U.S.C. §§ 2411-2416 (2002); *see generally* THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, *RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY* (1994) (discussing United States practice under section 301). Indeed, a desire to curb United States unilateralism was a prime motivator in the adoption of the DSU. *See* United States—Sections 301-310 of the Trade Act of 1974 (WT/DS152/R) ¶ 7.2 (Jan. 27, 2000) (discussing EC's characterization of the "historical deal . . . between the US and the other Uruguay Round participants").

78. *See* Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL. STUD. S179, S204 (2002) (WTO procedure a response to "the danger of excessive unilateral sanctions that exists in the absence of centralized oversight regarding the magnitude of sanctions").

79. *See* Charnovitz, *supra* note 16, at 815-16.

80. *See* Hudec, *supra* note 22, at 389-90.

81. *See id.*

82. *See* McGinnis & Movsesian, *supra* note 21, at 524-25 (explaining that protectionist groups can exploit nationalist sentiment).

83. *See* Hudec, *supra* note 22, at 390-91.

overreaching by the injured party: in Hudec's words, that the arbitrators' decision "look[] objective enough to persuade the relevant audiences . . . that a neutral tribunal [has] made an objective judgment of equivalence."<sup>84</sup> Indeed, the mere fact that arbitrators have cut back on a request for authorization to retaliate may go a long way toward reassuring citizens in the target country.

This observation highlights the second advantage of the WTO's mechanism. Formal authorization lends retaliation a legitimacy that self-help measures lack.<sup>85</sup> A country that retaliates unilaterally in a trade dispute runs the risk of appearing high-handed, especially if its economy is much larger than that of the target country.<sup>86</sup> A perception of arrogance could easily wreck a retaliation strategy for the reasons just discussed: citizens of the target country might grow resentful and resistant to free trade reform. Retaliation that comes at the end of a long third-party process, by contrast, seems less like bullying and more the result of neutral principles fairly applied.<sup>87</sup> As a result, it would be less likely to cause offense than unilateral retaliation, and less likely to backfire on the complaining nation.

To see how the retaliation remedy has worked in practice, consider the two disputes to date in which prevailing parties have resorted to it.<sup>88</sup> The first is *Bananas*. In 1997, in response to a complaint from the United States, the DSB ruled that European restrictions on the importation of bananas violated various WTO requirements.<sup>89</sup> The DSB allowed the EC a reasonable period of time to comply with the ruling by amending its laws; when the EC failed to do so, the United States

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84. *Id.* at 391 (discussing arbitrators' decision in *Bananas*).

85. See Green, *supra* note 4, at 110.

86. See *id.* at 110-11.

87. See *id.*; see also Hudec, *supra* note 22, at 390 (arguing that "[t]o avoid such perceptions [of unfairness], the important thing is not the fact of equivalence itself, but rather having some credible mechanism which can certify equivalence in a politically persuasive way").

88. The DSB has authorized retaliation in seven disputes, see *Update*, *supra* note 8, at ii, a number that already exceeds the total number of authorizations granted under the old GATT regime. See Movsesian, *supra* note 1, at 785 n.64. In only two, *Bananas* and *Hormones*, has the prevailing party acted on the authorization. Earlier this year, the WTO authorized the EC to retaliate against the United States, in the amount of roughly \$4 billion per year, in a dispute involving American business entities known as foreign sales corporations. See *Update*, *supra* note 9, at 141; see also United States—Tax Treatment For "Foreign Sales Corporations," Decision of the Arbitrator, WT/DS108/ARB, at ¶ 8.1 (Aug. 30, 2002). The EC has not yet acted on the authorization.

89. See Timothy M. Reif & Marjorie Florestal, *Revenge of the Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding*, 32 INT'L LAW. 755, 776-77 (1998). For the Appellate Body report that the DSU adopted in *Bananas*, see European Communities—Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997).

requested authorization to retaliate by raising tariffs on European products in the amount of \$520 million per year.<sup>90</sup> The EC objected to this request and the matter went to arbitration.<sup>91</sup> The arbitral panel pared down the level of retaliation to approximately \$191 million per year, and in April 1999 the DSB authorized the United States to raise tariffs to that extent.<sup>92</sup> The United States responded by imposing 100% tariffs on a variety of European products.<sup>93</sup>

The United States sanctions caused a great deal of consternation among targeted European exporters.<sup>94</sup> The exporters' complaints became particularly urgent when, in May 2000, the United States announced plans to rotate the list of targeted products every six months in accordance with a newly enacted "carousel" provision.<sup>95</sup> It is difficult to calculate precisely the impact that the exporters' complaints had on EC officials. Nonetheless, it seems reasonable to believe that pressure from affected exporters, particularly in light of the uncertainty generated by the threatened use of the carousel provision, was an important factor in getting the EC to settle its dispute with the United States.<sup>96</sup> In return for

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90. See European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WTO Doc. WT/DS27/ARB ¶ 1.1 (April 9, 1999) [hereinafter *Bananas Arbitrators Report*]; see also Charnovitz, *supra* note 16, at 795.

91. See *Bananas Arbitrators Report*, *supra* note 90, at ¶ 1.1.

92. See *id.* at ¶ 8.1; see also WTO Dispute Settlement Body, Annual Report (2001), Addendum: Overview of the State of Play of WTO Disputes, WTO Doc. WT/DSB/26/Add.1 at 64 (Oct. 12, 2001); John H. Jackson & Patricio Grane, *The Saga Continues: An Update on the Banana Dispute and Its Procedural Offspring*, 4 J. INT'L ECON. L. 581, 593 (2001).

93. See Bhala, *supra* note 70, at 944. The United States was not the only country that sought authorization to retaliate in *Bananas*. In November 1999, Ecuador requested authorization to retaliate against the EC in the amount of US\$ 450 million per year. See European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WTO Doc. WT/DS27/ARB/ECU ¶ 1 (Mar. 24, 2000). The arbitrators authorized Ecuador to retaliate in the amount of approximately US\$ 202 million per year. See *id.* at ¶ 173(a). The DSB approved, see Jackson & Grane, *supra* note 92, at 594, but in the end Ecuador did not retaliate. See Charnovitz, *supra* note 16, at 795.

94. See, e.g., William Chisholm, *Cashmere Industry Threatens EC Over US Sanctions Fear*, SCOTSMAN, Sept. 1, 2000, at 4 (noting "intensive efforts" by Scottish cashmere industry "to force Europe" to end the bananas dispute); Tina Dawson, *Joy Over Cashmere: Truce in U.S. 'Banana Wars' Will Save Ailing Scots Clothing Industry*, DAILY MAIL, April 12, 2001, at 45 (alluding to "[t]wo years of intense lobbying in Brussels, London and Washington" on behalf of affected Scottish cashmere producers).

95. See, e.g., Chisholm, *supra* note 94 (discussing threats by Scottish cashmere firms to sue EC for compensation in bananas dispute); Torcuil Crichton, *A Future Hanging by a Thread*, SUNDAY HERALD (Scotland), Sept. 3, 2000, at 6 (discussing Scottish firms' lobbying efforts in Brussels "for a resolution of the dispute" in light of carousel provision).

96. Although the United States did not actually implement the carousel measure, see Daniel Wuger, *The Never Ending Story: The Implementation Phase in the Dispute Between the EC and the United States on Hormone-Treated Beef*, 33 LAW & POL'Y INT'L BUS. 777, 807 (2002), "the threat

the EC's promise to amend its import restrictions on bananas, the United States dropped its retaliatory tariffs in July 2001.<sup>97</sup>

*Bananas* illustrates the effectiveness of the retaliation remedy in fostering change in a target country. *Hormones*, by contrast, shows that retaliation may not always be so successful. Like *Bananas*, *Hormones* involved a complaint by the United States against the EC, this time in connection with the EC's ban on the importation of American meat that had been treated with growth hormones.<sup>98</sup> In 1998, the DSB ruled that the EC's ban violated WTO rules and gave the EC a reasonable period of time to comply by amending its laws. Again the EC failed to do so, and again the United States requested authorization to retaliate, this time in the amount of \$202 million per year.<sup>99</sup> When the EC objected to this level, an arbitral panel reduced it to about \$117 million per year.<sup>100</sup> In July 1999, the DSB authorized retaliation in that amount; the United States responded by imposing 100% tariffs on various European products.<sup>101</sup>

Just as in *Bananas*, the new American tariff levels have occasioned complaints from European exporters.<sup>102</sup> On this occasion, however, the complaints have not succeeded in effecting a change in European policy.<sup>103</sup> Four years later, the ban on hormone-treated meat remains in place. There are no indications that the EC will lift it anytime soon.<sup>104</sup>

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of carousel rotation was probably a factor in getting the U.S. and EC administrations to reach a settlement in *Bananas*." Charnovitz, *supra* note 16, at 797.

97. Martin Crutsinger, *U.S. Eases Trade Duties As Banana Export Tussle Ends*, CHI. TRIB. July 2, 2001, at N3.

98. See McGinnis & Movsesian, *supra* note 21, at 599.

99. See European Communities—Measures Concerning Meat and Meat Products (*Hormones*)—Original Complaint by the United States—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU—Decision of the Arbitrator, WT/DS26/ARB ¶ 1 (July 12, 1999).

100. See *id.* at ¶¶ 83-84.

101. See Charnovitz, *supra* note 16, at 796. In the same dispute, an arbitral panel authorized Canada to retaliate against the EC in the amount of approximately C\$ 11 million per year. European Communities—Measures Concerning Meat and Meat Products (*Hormones*)—Original Complaint by Canada—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS48/ARB ¶¶ 72-73 (July 12, 1999). Like the United States, Canada has acted on this authorization by imposing 100% tariffs on various European products. See Charnovitz, *supra* note 16, at 796.

102. See, e.g., David Pearson, *Mustard Makers Are Heated Up Over Tariffs*, WALL ST. J. EUR., Aug. 13, 2001, at 18.

103. See Michael M. Weinstein & Steve Charnovitz, *The Greening of the WTO*, 80 FOREIGN AFF. 147, 150 (2001) (noting that American trade sanctions "have not forced the Europeans to back down" in *Hormones*).

104. See Wuger, *supra* note 96, at 809 (noting that the EC has "never considered withdrawing its ban on hormone-treated beef imports. Rather, it tends to further reinforce its measures.").



Critics have pointed to *Hormones* as an example of the ineffectiveness of the WTO's enforcement mechanism.<sup>105</sup> While the criticisms have some merit—retaliation obviously has failed to occasion compliance by the EC—they miss a larger point. Retaliation has failed to secure compliance in *Hormones* because of the strong popular support in Europe for the ban on hormone-treated meat.<sup>106</sup> As the Appellate Body ruling in the case pointed out, European consumers have widespread and genuine concerns about the safety of such meat.<sup>107</sup> Pressure from exporters who suffer from American tariffs is simply not enough to overcome the effect of these concerns in the democratic process. European regulators who attempt to lift the ban likely would suffer serious political punishment.<sup>108</sup>

*Hormones* thus demonstrates a practical flexibility that will serve as a long-run advantage for the WTO's enforcement regime. Where, as in *Hormones*, there is strong popular support for an import restriction, a nation can keep the restriction in place—as long as the nation is willing to pay a price in terms of foregone export opportunities.<sup>109</sup> A more rigorous enforcement mechanism, one that purported to compel a nation to repeal a measure with substantial popular support, would only create a crippling backlash against the WTO.<sup>110</sup> Indeed, a nation's capacity to retain an import restriction that has substantial popular support can serve as a useful check against the potential for overreaching by the DSB—a matter to which I will turn shortly.

The flexibility of the retaliation remedy also makes it superior to an alternative enforcement mechanism: direct effect.<sup>111</sup> Under a direct effect regime, DSB rulings would bind domestic courts automatically, without further action by national authorities.<sup>112</sup> If the DSB were to rule

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105. See, e.g., Gleason & Walther, *supra* note 12, at 728; Weinstein & Charnovitz, *supra* note 103.

106. See, e.g., Kaminski, *supra* note 64.

107. See WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (*Hormones*), WT/DS26/AB/R ¶ 245 (Jan. 16, 1998).

108. See Charnovitz, *supra* note 16, at 820; Wuger, *supra* note 96, at 809.

109. See Charnovitz, *supra* note 16, at 820.

110. See J. Patrick Kelly, *The WTO and Global Governance: The Case For Contractual Treaty Regimes*, 7 WIDENER L. SYMP. J. 109, 134-35 (2001) (explaining that international enforcement mechanisms that impose norms on countries would create backlash); cf. Nichols, *supra* note 35, at 659 (noting danger that rigid dispute settlement system might "actually hinder the prospects for free trade").

111. For sources on direct effect regimes, see *supra* note 15.

112. See James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 141-42 (2000); see also Charnovitz, *supra* note 16, at 824-25 (discussing use of term "direct effect"). Commentators sometimes draw a distinction between direct effect and the supremacy of DSB rulings. See, e.g., Cottier & Schefer, *supra* note 15,

that a national measure violated WTO requirements, national courts could no longer apply the measure as a rule of decision. If national authorities tried to invoke the measure against private parties, national courts would deny enforcement.<sup>113</sup> Indeed, private parties themselves might rely on the DSB's ruling as the basis for an action against the state.<sup>114</sup>

One might view direct effect as having two principal advantages over the present regime. First, by enlisting national courts, direct effect might better promote compliance with WTO requirements, particularly by powerful countries that might otherwise ignore DSB rulings. For example, commentators argue that the retaliation remedy is of relatively little use in the context of a complaint by a developing country against a developed country.<sup>115</sup> Because retaliation is limited to the extent of the complaining member's loss, the remedy provides little incentive for the developed country to change its ways: the impact of retaliation by the developing country is likely to be minuscule in relation to the developed country's larger economy.<sup>116</sup> Under a direct effect regime, by contrast, the "option to breach" would not exist,<sup>117</sup> and developed countries might be more likely to honor their WTO obligations.

Second, direct effect might give quicker relief to private firms—by some accounts, the primary beneficiaries of the WTO system.<sup>118</sup> For example, consider the plight that the present regime creates for an importer whose government has adopted a protectionist measure. Even if the DSB rules that the measure is invalid, the firm must wait to see whether retaliation by the complaining member eventually convinces the

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at 100-01. That is, one could envision a regime in which WTO obligations were self-executing in national courts, but national courts were free to reject the DSB's rulings on the nature of those obligations. Cf. Jackson, *supra* note 15, at 326-27 (describing this scenario in the context of international institutions generally). I do not draw that distinction here: I use direct effect to mean a regime in which a DSB ruling automatically binds a domestic court, without implementation of the DSB's ruling by national authorities.

113. See Cottier & Schefer, *supra* note 15, at 91 (describing direct effect as regime in which "a private person in a state . . . may base a claim in, and be granted relief from, the domestic courts of that state against another private person or the state on the basis of the state's obligations under an international treaty").

114. See Ruttle, *The Effect of WTO Agreements*, *supra* note 15, at 130-31; Smith, *supra* note 112, at 142; see also Abbott, *supra* note 15, at 158, 171-72, 184 (discussing how, under direct effect regime, private parties would be able to vindicate rights in national court systems).

115. See, e.g., Pauwelyn, *supra* note 13, at 338; Young, *supra* note 13, at 408.

116. See, e.g., Palmetier, *supra* note 1, at 473.

117. Jackson, *supra* note 15, at 325 (discussing direct effect in international law generally).

118. See Ruttle, *WTO Dispute Settlement*, *supra* note 12, at 169; Ruttle, *The Effect of WTO Agreements*, *supra* note 15, at 130, 155; cf. Cottier & Schefer, *supra* note 15, at 111 (stating that "[f]rom an . . . individual rights' point of view, it is difficult to sustain the denial of direct effect").

government to repeal the measure. This may take a considerable period of time, during which the import restriction will continue to impose a loss on the firm.<sup>119</sup> Under a direct effect regime, by contrast, the firm could immediately bring an action in a domestic court for an injunction to prevent the measure's enforcement.

So far, WTO members have resisted calls to move to direct effect.<sup>120</sup> In part, this resistance can be explained by the limited nature of the political commitment that members, particularly developed countries, have made to the organization.<sup>121</sup> Notwithstanding their formal agreement to an enhanced enforcement mechanism, members have remained quite wary of granting the WTO too much authority over their decisions.<sup>122</sup> Given this wariness, members' refusal to grant DSB rulings direct effect should come as no surprise.<sup>123</sup>

But more than mere truculence explains the unwillingness to adopt a direct effect mechanism. Members are right to reject direct effect. Direct effect would take the advantages of the retaliation mechanism and precisely invert them. For example, where retaliation works indirectly, creating incentives for exporters without intruding expressly on the prerogatives of national institutions, direct effect would commandeer domestic courts and make them subalterns of the DSB. Instead of counteracting the influence of protectionist groups, direct effect would empower them with a "patriotic" argument.<sup>124</sup> Just as in the case of

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119. For a similar example focusing on an exporting firm, see Ruttley, *WTO Dispute Settlement*, *supra* note 12, at 180-81.

120. See Charnovitz, *supra* note 16, at 825. For example, the ECJ has indicated that WTO obligations do not have direct effect in the European Communities. Ruttley, *WTO Dispute Settlement*, *supra* note 12, at 188. In the United States, the matter is settled by section 102 of the Uruguay Round Agreements Act, which firmly denies effect to any DSB ruling that is inconsistent with existing United States law. See 19 U.S.C. § 3512(a)(2) (2002). On the absence of direct effect in international dispute settlement generally, see Smith, *supra* note 112, at 142.

121. See Hudec, *supra* note 22, at 372-76.

122. See *id.*; see also Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 11-14 (1999). As Hudec describes it, members agreed to an enhanced enforcement mechanism in the Uruguay Round as a means of blunting a resurgent American unilateralism in trade matters. See Hudec, *supra* note 22, at 373-74. Members' "basic political attitudes" about the undesirability of central control over their decisions "had not changed," however. *Id.* at 375. As Hudec writes, "[a]n agreement adopted with this much reluctance will almost certainly encounter a bias against making its enforcement pressures stronger." *Id.* at 376.

123. See Carlos M. Vazquez & John H. Jackson, *Some Reflections on Compliance With WTO Dispute Settlement Decisions*, 33 LAW & POL'Y INT'L BUS. 555, 565 (2002) (members "were unwilling to pay the collateral costs in terms of sovereignty for a regime that would achieve [perfect] compliance").

124. See McGinnis & Movsesian, *supra* note 21, at 524-25 (explaining that protectionist groups can exploit nationalist sentiment).

excessive retaliation, it would be easy for protectionist groups to characterize direct effect as an affront to national sovereignty, and to rally resistance to the assertion of supremacy by the WTO.<sup>125</sup>

Moreover, where the retaliation remedy allows a nation to retain a trade restriction that has substantial popular support (as in *Hormones*), a direct effect mechanism would not. Once the DSB had ruled that the restriction violates WTO requirements, domestic courts theoretically would be powerless to enforce it.<sup>126</sup> Again, an assertion of supremacy in these circumstances would create a public backlash that would make it difficult for government officials to dismantle the restriction. Indeed, the public response might cause a member to retreat from WTO obligations generally.<sup>127</sup>

Thus, despite the claims of its proponents, direct effect would promote disdain for the WTO and make it more difficult for groups that benefit from free trade to obtain relief. In addition, in eliminating the option to breach, a direct effect regime would remove an important check against the long-term potential for overreaching by the WTO.<sup>128</sup> While the WTO at present poses little threat to representative democracy in member states, the organization may seek to expand its powers in the future.<sup>129</sup> Indeed, a number of commentators and politicians are urging the WTO to take a more active role in setting global policies on the environment, labor relations, and other regulatory matters.<sup>130</sup> Some recent DSB rulings suggest that the organization is willing to do so.<sup>131</sup>

125. See Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 416 (1996) (showing how protectionists have made sovereignty arguments to resist WTO dispute settlement); see also Hudec, *supra* note 22, at 389-90 (describing effects of excessive retaliation).

126. See Smith, *supra* note 112, at 141-42.

127. See Cottier & Schefer, *supra* note 15, at 112 (explaining that assertion of direct effect "might spur a formal or, more likely, informal retreat from WTO membership"); cf. Nichols, *supra* note 35, at 660 (explaining how "intemperance" of the WTO's dispute settlement mechanism might eventually "hinder the ability of member countries to support the" organization).

128. See McGinnis & Movsesian, *supra* note 21, at 569; see also JACKSON ET AL., *supra* note 30, at 223 (absence of direct effect for DSB rulings "'can be an important constraint if matters go seriously wrong'") (quoting testimony of John H. Jackson before the Senate Finance Committee).

129. See Kelly, *supra* note 110, at 114 (explaining that WTO at present "is not an unaccountable body," but "a contractual regime controlled by states and thus responsive to individual states' political agendas"); Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT'L L. REV. 537, 537 (2001) (noting "distrust engendered by the inevitable expansion of the WTO trade mandate into areas such as labor, the environment, and human rights").

130. See Kelly, *supra* note 110, at 111; McGinnis & Movsesian, *supra* note 21, at 550-52.

131. See McGinnis & Movsesian, *supra* note 21, at 519. But cf. Davey, *supra* note 1, at 96 (arguing that panel and Appellate Body rulings do not suggest "overreaching . . . so as to . . . limit inappropriately the discretion of Member government policy-making"). For an argument that WTO

Granting the WTO more authority over the substance of national regulatory policy *would* pose a threat to representative democracy. Regulatory policy requires a sensitive balancing of a variety of factors. Environmental regulation, for example, often involves consideration of local ecological conditions, industrial practices, economic realities, and social norms.<sup>132</sup> Labor rules may implicate traditional cultural usages and expectations about the nature of work.<sup>133</sup> Representative democracy requires that decisions about such matters be made by actors that are accountable to the public.<sup>134</sup> In this way, the decisions acquire a legitimacy that makes them worthy of respect.<sup>135</sup>

To be sure, national policies do not always reflect the public interest; indeed, that is a central premise of this Essay. But national governments are far more accountable than the WTO.<sup>136</sup> Unlike WTO staffers, national officials must stand for popular election at least once in a while.<sup>137</sup> They are thus both more familiar and accessible to the average citizen than policymakers at the WTO.<sup>138</sup> Moreover, national institutions typically have organic connections to the polity—links of shared history and culture—that the WTO utterly lacks.<sup>139</sup> As a result, regulations that national bodies adopt are much more likely to reflect local tastes, traditions and realities than any rules the WTO would formulate.<sup>140</sup>

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tribunals will play a role in an inevitable shift of regulatory power to a global regime, see Charles H. Koch, Jr., *Judicial Review and Global Federalism*, 54 ADMIN. L. REV. 491, 492, 500, 510 (2002).

132. See Terry L. Anderson & J. Bishop Grewell, *It Isn't Easy Being Green: Environmental Policy Implications For Foreign Policy, International Law, and Sovereignty*, 2 CHI. J. INT'L L. 427, 440 (2001) (explaining how "international environmental regulation suffers from a lack of . . . information" about local conditions); Kelly, *supra* note 110, at 120; Nichols, *supra* note 35, at 673-79 (discussing ways in which national environmental regulations reflect societal values).

133. See Nichols, *supra* note 35, at 683-85 (discussing ways in which national labor regulations reflect societal values).

134. See John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2240 (1999) ("As a matter of accountability, when the government imposes rules of conduct on individuals, those rules ought to be made by members of the legislature who directly represent the people.").

135. See Kelly, *supra* note 110, at 134.

136. See Ku, *supra* note 24, at 121 (discussing relative unaccountability of international organizations); see also *id.* at 125 (discussing unaccountability of WTO dispute settlement panels).

137. See *id.* at 121.

138. See McGinnis & Movsesian, *supra* note 21, at 566-67.

139. See Movsesian, *supra* note 1, at 816-17; see also Ku, *supra* note 24, at 77, 126-29 (discussing how lack of historical mythos creates a legitimacy deficit for international organizations); Nichols, *supra* note 35, at 671-72 (discussing arguments that law derives legitimacy from congruence with societal values).

140. See Anderson & Grewell, *supra* note 132, at 440; McGinnis & Movsesian, *supra* note 21, at 567.

Thus, a direct effect regime, one in which the decisions of relatively unaccountable trade bureaucrats would automatically preempt those of relatively accountable national institutions, might eventually pose a real threat to representative government.<sup>141</sup> Once one appreciates this threat, the option to breach begins to look like a democratic safeguard, a means of ensuring that representative national bodies have the final say on whether and how to respond to the rulings of a supranational institution.<sup>142</sup> At the moment, as I say, the prospect of an effective power grab by the WTO seems remote. If members ever do grant the WTO substantive regulatory authority, however, the option to breach will be an important safeguard indeed.<sup>143</sup>

The comparison with direct effect shows the genius of the current enforcement mechanism. The retaliation remedy helps solve a dilemma at the heart of the world trade regime: how to give the WTO sufficient power to promote global trade without conferring so much power that the organization becomes a threat to representative democracy. Retaliation accomplishes this task by promoting trade indirectly, creating incentives for domestic groups to lobby against protectionist measures while allowing national governments the ultimate say on regulatory policy. Retaliation may not always ensure compliance; as *Hormones* shows, the pressures that retaliation creates may not always be sufficient to overcome strong public support for an offending measure. Still, by striking a prudent balance between free trade and self-government, the retaliation remedy makes a vital contribution to the emerging world trade system.

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141. See ADVISORY COMMISSION REPORT, *supra* note 17, at 14, 114; cf. Cottier & Schefer, *supra* note 15, at 97-98 (discussing argument that direct effect is "dangerous to the idea of democracy and democratic representation of individuals").

142. As Patrick Kelly observes, "[i]n order to preserve democratic legitimacy, international regulation should be based on contractual arrangements that are at some point presented either to domestic legislatures or to a vote of the people." Kelly, *supra* note 110, at 134. For more on how the denial of direct effect can "reinforce democratic legitimacy," see Joel P. Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT'L L. 655, 677 (1999).

143. See JACKSON ET AL., *supra* note 30, at 223 (absence of direct effect for DSB rulings "'can be an important constraint if matters go seriously wrong'" (quoting testimony of John H. Jackson before the Senate Finance Committee).

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